



## NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

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Volume 27 | Number 3

Article 1

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Spring 2002

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### Recommended Citation

Victor C. Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. J. INT'L L. & COM. REG. 393 (2001).

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# Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls

## **Cover Page Footnote**

International Law; Commercial Law; Law

# Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls

*Victor C. Romero\**

## I. The Problem: Producing Highly Educated Farmworkers

Carmen Medina is the Executive Director of the Adams County Delinquency Prevention Program, a state-sponsored initiative designed to attend to the needs of school-age children in south central Pennsylvania.<sup>1</sup> While perhaps best known as the site

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\* Professor of Law, Pennsylvania State University-Dickinson School of Law. J.D., 1992, University of Southern California; B.A., 1987, Swarthmore College. I would like to thank Tamesha Keel and Hiroshi Motomura for inviting me to participate in this Symposium, and my co-participants whose comments helped improve this piece; Matt Hughson and Gwenn McCollum for their excellent research assistance; Suzanne Benchoff (Director, Migrant and ESL Programs, Lincoln Intermediate Unit, New Oxford, PA), Pedro Cortes (Executive Director, Governor's Advisory Commission on Latino Affairs, PA), Melissa Landrau-Rodriguez (College Assistance Migrant Program, Pennsylvania State University), Carmen Medina (Executive Director of the Adams County Delinquency Prevention Program), Sharon Price (Aide to Pennsylvania State Representative Stephen R. Maitland), and Bob Reilly (Legislative Assistant to Congressman Todd R. Platts, R-PA), for lending me their expertise on this complex subject; my law school and university colleagues Stephanie Bjorklund, Dorie Evensen, Ken Gray, Jay Mootz, Bob Rains, Jane Rigler, and John Stuhr for their help with the "education as work" theory I espouse here; Peter Glenn for his generous funding of this and many other projects; and most especially, Michael Olivas, for his pioneering work in this field and his tireless advocacy of these issues. As always, I thank my wife, Corie, my son, Ryan, and my family in the Philippines for their untiring love and support. All errors that remain are mine alone.

<sup>1</sup> More specifically, Ms. Medina runs a program called "Generacion Diez" :

Generacion Diez is an after-school program in Adams County, Pennsylvania, that aims to address major problems affecting the growing migrant community in the area. Specifically, its goals are: 1) to reduce school failure and absences in migrant children; 2) to improve the children's study and social skills and promote social-emotional competence; 3) to provide migrant parents with instrumental and social support and improved access to social service resources; and 4) to increase parent-teacher involvement and cooperation. Intensive English as a Second Language (ESL) and social skills classes, home visits, and school collaboration are among the strategies employed by Generacion Diez to achieve these goals. The program was first implemented in October 1998, with the support and collaboration of the PA Department of Public Welfare's Office

of the Battle of Gettysburg,<sup>2</sup> Adams County is also an agricultural powerhouse, producing more apples and peaches than virtually any other area of the United States.<sup>3</sup> Because of its agrarian economy, Adams County is also the home of a large number of Mexican farmworkers, many of whom came to this country without proper work or immigration papers, their young children in tow, in search of a better life.<sup>4</sup> It is with these farmworkers'

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of Children, Youth and Families, and the PA Department of Education's Migrant Education Program. The Prevention Research Center is currently conducting a formative and process evaluation to determine the initial effects and issues stemming from the program.

Pennsylvania State University Department of Health and Human Services Prevention Research Center for the Promotion of Human Development, Middle Childhood Projects at <http://www.prevention.psu.edu/middle.html> (last visited Apr. 2, 2002).

<sup>2</sup> See, e.g., EDWIN G. CODDINGTON, *THE GETTYSBURG CAMPAIGN—A STUDY IN COMMAND* (Touchstone 1997) (1968).

<sup>3</sup> Adams County is such a prominent producer of apples that the National Apple Museum is located there. See National Apple Museum Website, at <http://www.usad.k12.pa.us/upperadams/appmus/apple1.htm> (last visited Apr. 2, 2002); Encyclopedia Britannica Intermediate On-Line, Pennsylvania, at <http://search.ebi.eb.com/ebi/article/0,6101,36385,00.html> (last visited Apr. 2, 2002) ("[A]pples are grown in Adams County. [Pennsylvania] ranks among the top five states in the production of apples, grapes, and peaches."); Pennsylvania Farm Bureau, Pennsylvania Agricultural Information, at <http://www.pfb.com/news/aginfo.html> (last visited Apr. 2, 2002) ("Pennsylvania ranks 18th nationally in total agricultural cash receipts. California is first. Pennsylvania ranks 4th in production of peaches, eggs and grapes, 5th in apples and processing tomatoes and 6th in production of pears, tart cherries and snap beans.").

<sup>4</sup> E-mail from Carmen Medina, Executive Director of the Adams County Delinquency Prevention Program, to Victor C. Romero (Dec. 6, 2001) (on file with author). See also Diana Fishlock, *Fill the Job: Mexicans Are The Core of Work Force*, *THE SUNDAY PATRIOT NEWS* (Pennsylvania) (on file with author), Oct. 12, 2001, at B1, available at 2001 WL 2718208 (noting that Mexicans account for most of the farm labor in Adams County). Suzanne Benchoff, Director of Migrant and ESL Programs at the Lincoln Intermediate Unit in New Oxford, Pennsylvania, notes that while many of the younger children in these Mexican families were born in the United States, and hence are U.S. citizens, the older ones who came with their families are usually undocumented. E-mail from Suzanne Benchoff, Director, Migrant and ESL Programs, Lincoln Intermediate Unit, New Oxford, PA, to Victor C. Romero (Dec. 28, 2001) (on file with author). Benchoff writes:

My experiences of 23 years with this program indicate that many of the children are in fact born in the USA, i.e., making them citizens. Many of the parents do not have legal working papers—again—this is anecdotal as we do not collect this information. This issue of undocumented children and their access to higher education is highlighted by those children who are in grades 9–12 currently as many of them are indeed without proper documentation to apply for

children that Medina's office is most concerned. Aside from providing these children with social, cultural, and educational support, Medina's office also strongly encourages them to work hard at school so that they may maximize their opportunities after high school. Yet, Medina has grown increasingly uncomfortable dispensing such advice. By her estimate,<sup>5</sup> ninety-seven percent of these children are undocumented like their parents and therefore are effectively barred from pursuing postsecondary education because of their undocumented status, their poverty, or both.<sup>6</sup> Indeed, undocumented status and poverty are mutually reinforcing obstacles to advancement. While colleges and universities are not barred from admitting them, undocumented immigrants cannot effectively compete for post-graduation jobs for which they have been trained because employers can be sanctioned for knowingly hiring such persons.<sup>7</sup> In addition, undocumented immigrant

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federal aid. The younger children are those who have been born here after their parents settle here. My experience shows very few migrant parents "overstay"—which was the case in the 1980s when migrant workers were in this area under H2 Visa status . . . and indeed "overstayed"; however most of these cases are of Haitian or Jamaican origin. Most of our families in Adams county are of Mexican descent and intend to remain here for better wages and better educational opportunities for their entire family. Much of the capital earned here in the USA is returned to remaining family members in Mexico.

*Id.*

<sup>5</sup> As with most estimates of undocumented immigration, these are intelligent guesses at best. See, e.g., Press Release, Center for Immigration Studies, Eight Million Illegal Aliens in 2000: Finding Raises Concern Over Border Control in Light of Terrorist Threat (Oct. 24, 2001), at <http://www.cis.org/articles/2001/censusrelease1001.html> (on file with the North Carolina Journal of International Law and Commercial Regulation).

The Bureau found 8.7 million foreign-born individuals in the 2000 Census who appeared not to have legal status. However, because records for some legal immigrants are not available from the Immigration and Naturalization Service (INS), the Bureau estimates that 1.7 million of the 8.7 million already had legal status or were likely to gain it soon. If these individuals are excluded, then 7 million illegals were counted in 2000. The Census Bureau also estimates that roughly one million illegal aliens were likely missed in last year's count, meaning that the total illegal population stood at 8 million in 2000.

*Id.*

<sup>6</sup> See E-mail from Carmen Medina to Victor Romero, *supra* note 4.

<sup>7</sup> Immigration and Nationality Act (INA) § 274A, 8 U.S.C. § 1324a (2000) (unlawful employment of noncitizens). I admit, of course, that several factors might hinder this provision's ability to deter unauthorized employment including under-enforcement by the INS and document fraud by prospective employees. Telephone

students are largely ineligible for federal and state financial aid, ensuring their continued occupancy of the lower rungs of the socioeconomic ladder.<sup>8</sup> Thus these two factors—undocumented status and poverty—work in tandem to preclude many undocumented children, like most of those in Adams County, from pursuing a college degree, leading Medina to comment sarcastically that all her program is doing is to help create a class of well-educated farm workers.

Not surprisingly, the problem Medina describes is not unique to Pennsylvania but is one which many states with increasing immigrant populations have confronted: Should longtime undocumented immigrants have the same opportunity as lawful permanent residents and U.S. citizens to attend state colleges and universities?<sup>9</sup> There are two typical justifications for denying them such opportunities. First, treating undocumented immigrants as in-state residents discriminates against U.S. citizen nonresidents of the state. Second, and more broadly, undocumented immigration should be discouraged as a policy matter, and therefore allowing undocumented immigrant children equal opportunities as legal residents condones and perhaps encourages “illegal” immigration. This essay responds to these two concerns by surveying state and federal solutions to this issue.

## II. Existing Federal and State Legislation

For most of U.S. history,<sup>10</sup> immigration law has been a federal mandate.<sup>11</sup> At the same time, public education has been primarily

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Interview with Michael Olivas, Professor of Law, University of Houston Law Center (Jan. 30, 2002).

<sup>8</sup> See *infra* Part II (discussing existing federal and state legislation).

<sup>9</sup> Currently debates are raging in New York, Washington, Minnesota, Utah, and North Carolina over this very issue. See Sara Hebel, *States Take Diverging Approaches on Tuition Rates for Illegal Immigrants*, CHRON. HIGHER EDUC., Nov. 30, 2001, at A22–23.

<sup>10</sup> Prior to the founding, citizenship was a matter for the states, not the federal government. See GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION* 64 (1996) (“In the immediate post-Revolutionary period, citizenship in an individual state was the dominant concept.”).

<sup>11</sup> Unfortunately, the word “immigration” appears nowhere in the Constitution. The terms “naturalization,” “commerce with foreign nations,” and the congressional power “to declare war” have all been raised as textual foundations for the federal immigration authority, although none specifically use the term. Stephen Legomsky has

a state and local governmental affair.<sup>12</sup> Despite this general division, the federal government has often used its immigration power to influence state policies affecting immigrants. Whether it is exercised under the purview of constitutional preemption<sup>13</sup> or differential Equal Protection analysis,<sup>14</sup> Congress's plenary power<sup>15</sup> over immigration, and the Immigration and Naturalization Service's (INS) administrative mandate to enforce the same,<sup>16</sup> afford the federal government broad power to affect immigrant

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raised the question whether, *à la McCulloch v. Maryland*, immigration might be a "necessary and proper" derivative of the federal government's naturalization power. Despite this lack of specific text, the Supreme Court has consistently affirmed, explicitly and implicitly, the federal government's plenary power over immigration. See Victor C. Romero, *Devolution and Discrimination*, 58 N.Y.U. ANN. SURV. AM. L. (forthcoming 2002).

<sup>12</sup> Despite calls for national testing requirements and the wide availability of federal government funding, school administration is primarily left to individual states. For an argument against federalizing schools, see John Ashcroft, *The President's National Testing Proposal Must Be Stopped*, 17 ST. LOUIS U. PUB. L. REV. 1, 1 (1997) ("Any movement toward national control of education savages principles that we as Americans hold dear: parental authority and control, teachers who are free to teach core subject matter and school boards that are responsive to their communities, not held captive by distant bureaucrats.").

<sup>13</sup> As in other fields, because immigration law is national in nature, any state law that conflicts with existing federal policy is deemed preempted. See, e.g., Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1060-65 (1979); David F. Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069, 1089-90 (1979).

<sup>14</sup> See, e.g., Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After Adarand Constructors, Inc. v. Peña*, 76 OR. L. REV. 425 (1997).

<sup>15</sup> See, e.g., Victor C. Romero, *On Elian and Aliens: A Political Solution to the Plenary Power Problem*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 343, 348 (2000) ("The difficulty in judicially protecting individual rights of noncitizens in the context of immigration policy stems from the Supreme Court's recognition of the so-called plenary power of Congress over immigration matters.").

<sup>16</sup> See, e.g., *Gonzalez v. Reno*, 212 F.3d 1338, 1348-49 (11th Cir. 2000).

Because the statute is silent on the issue . . . Congress has left a gap in the statutory scheme. From that gap springs executive discretion. As a matter of law, it is not for the courts, but for the executive agency charged with enforcing the statute (here, the INS) to choose how to fill such gaps. Moreover, the authority of the executive to fill gaps is especially great in the context of immigration policy. Our proper review of the exercise by the executive branch of its discretion to fill gaps, therefore, must be very limited.

*Id.*

policy in areas traditionally left to the states. Thus, Congress has passed legislation involving immigrants' welfare entitlements<sup>17</sup> and criminal law obligations,<sup>18</sup> two fields often viewed as primarily local in scope. Yet, those who favor such incursions justify them as necessary means to control immigration. After all, immigrants seek to become citizens of the United States, not California or New Jersey. Thus, even if such federal legislation does not directly affect foreign ingress and egress, its impact on state and local legislation is considerable.

*A. Bars to State Largesse: A Critique of IIRAIRA  
Section 505*

On the issue of education, current federal law states that [a noncitizen] who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.<sup>19</sup>

This provision was enacted in 1996 as section 505 of the infamous Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), which has been vilified by commentators for its establishment of certain anti-immigrant rights provisions, such as expedited removal<sup>20</sup> and curtailment of judicial review of most

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<sup>17</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 400–451, 110 Stat. 2105, 2260–77 (1996) (codified as amended at 8 U.S.C. §§1601–1646 (2000)) [hereinafter PRWORA].

<sup>18</sup> See, e.g., Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 401–443, 110 Stat. 1214, 1258–80 (1996) [hereinafter AEDPA]; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 § 306, 110 Stat. 3009-546, 612 (codified as amended at 8 U.S.C. § 1252(g) (2000)) [hereinafter IIRAIRA]; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001) [hereinafter USA PATRIOT ACT].

<sup>19</sup> 8 U.S.C. § 1623 (2000). There is a second provision that deprives undocumented immigrants of certain state and local benefits, although it permits states to override this provision through subsequent legislation. See Stanley Mailman & Stephen Yale-Loehr, *College for Undocumented Immigrants After All?*, N.Y.L.J., June 25, 2001, at 5 (discussing 8 U.S.C. § 1621 (1996)).

<sup>20</sup> See, e.g., University of California, Hastings College of the Law, *The Expedited Removal Study*, at <http://www.uchastings.edu/ers> (last updated July 9, 2001) ("The Study seeks to determine whether expedited removal, as implemented, meets the dual



deportation orders.<sup>21</sup> Aside from fulfilling IIRAIRA's general objective of deterring undocumented immigration,<sup>22</sup> this postsecondary education law protects U.S. citizens from discrimination by a state that might be inclined to grant in-state tuition benefits to some but not others.<sup>23</sup> Put another way,

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congressional objectives of preventing abuse of the process, while at the same time identifying and screening-in individuals who fear persecution.”).

<sup>21</sup> See, e.g., Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997) (discussing the constitutionality of court-stripping provisions of IIRAIRA).

<sup>22</sup> The constitutionality of this provision is beyond the scope of this essay, but Michael Olivas raises the issue of whether this particular provision violates federalism principles by dictating to states what they can do with state funds. See Hebel, *supra* note 9, at A23. Indeed, an analogy might be drawn to *Printz v. United States*, in which the Supreme Court struck down portions of the Brady Bill that required local police to enforce federal laws. 521 U.S. 898, 935 (1997) (“The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”). Here, Congress is using IIRAIRA section 505 to force the states to regulate immigration, a federal prerogative, through the use of state funds. The counterargument is that, unlike the Brady Bill, section 505 does not directly compel states to enforce immigration law, but merely permits them to deter unlawful immigration by restricting state benefits. Olivas also suggests that *Toll v. Moreno*, 458 U.S. 1 (1982), in which the Court struck down a Maryland law denying in-state tuition benefits to lawful nonimmigrants and immigrants on Supremacy Clause grounds, provides support for section 505’s unconstitutionality as well. Telephone interview with Michael Olivas, *supra* note 7. To the extent that the *Moreno* Court’s reasoning applies with similar force to undocumented persons, Olivas might have a point. However, *Moreno* is arguably distinguishable because the federal government here has exercised its plenary power over immigration through IIRAIRA, thereby permitting states to legitimately discriminate against undocumented aliens. (Indeed, even if Olivas’s arguments were persuasive, it would be legitimate to wonder whether the bare 5–4 majorities of *Plyler* and *Toll* favoring noncitizens could be cobbled together on the current, more conservative court.) Furthermore, as a practical matter, it would be difficult to challenge the constitutionality of this provision for two reasons: First, the INS has not enacted federal regulations implementing the statute because it has no interest in dictating the disbursement of state funds. When confronted with undocumented immigration, the INS’s answer is to deport the individual, not force the state to deny her public benefits. Second, challenging the constitutionality of the statute will likely only occur should the Justice Department choose to pursue it since IIRAIRA does not provide individuals the opportunity to bring private suits. See Hebel, *supra* note 9, at A23.

<sup>23</sup> Indeed, during the Symposium, David Martin reminded us that Rep. Elton Gallegly (R-Cal.) would have amended IIRAIRA to include a provision precluding states from providing K-12 benefits in contravention of the Supreme Court’s 1982 decision in *Plyler v. Doe*, discussed *infra* Part III(A). His theory was that *Plyler* only mandated that states provide K-12 public education because the federal government had not addressed

Congress wanted to ensure that undocumented immigrants would not be made better off than U.S. citizens by some states. This essay will examine the validity of both of these goals: first, to protect U.S. citizens over undocumented immigrants, and second, to deter undocumented immigration generally.

As to the first objective, closer scrutiny of the law suggests that there is no rational basis for necessarily favoring non-state resident U.S. citizens over in-state resident undocumented persons given the myriad exceptions to residency requirements that already appear in state law. Many residency requirements use as their determining factors two criteria: (1) whether an individual *intends* to reside in-state and (2) the *duration* of the person's stay in-state. I will refer to these as the "intent" and "duration" requirements of traditional residency laws.

In an excellent, pre-IIRAIRA study, Professor Michael Olivas demonstrated the inconsistent and incoherent assumptions underlying most state residency laws, effectively arguing that many state institutions grant in-state status to nonresidents who have satisfied neither the intent nor duration requirements.<sup>24</sup> I have a personal example to share on this point. When our family moved from California to Pennsylvania, my wife received in-state tuition for her master's program at the University of Maryland because she was simultaneously offered a job as a graduate research assistant. She had no intention of living in Maryland after graduate school, since I had accepted a permanent teaching position in Pennsylvania. As Olivas explains:

Graduate students rarely are paid well and certainly provide important instructional or research services to institutions. Paying their tuition seems a modest benefit and one well worth preserving, but using the residency requirement to deem the students "residents" is a curious bookkeeping maneuver, one that undermines the residency determination system.<sup>25</sup>

Returning to the example of the Adams County farmworker

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this specific issue. Gallegly's amendment did not pass. See 142 CONG. REC. H. 2475 (daily ed. Mar. 20, 1996) (statement of Rep. Gallegly).

<sup>24</sup> Michael A. Olivas, *Storytelling Out of School: Undocumented College Residency, Race, and Reaction*, 22 HASTINGS CONST. L.Q. 1019, 1033 (1995) ("The most striking feature among these [residency laws] is how few exemptions or special treatment have anything to do with the fundamental concepts of duration or intention.").

<sup>25</sup> *Id.* at 1034.

children, why should they, who likely meet both intent and duration requirements under the traditional residency test, not be entitled to in-state college tuition when my wife, who had fulfilled neither criterion, was eligible? The answer cannot be that my wife worked as a research assistant, thereby conferring upon the university (or more accurately, the professor for whom she worked) some benefit. Indeed, some Adams County high school graduates have long contributed to the economy of Pennsylvania (and to the people of the United States) through their many years of work in the local apple and peach orchards.<sup>26</sup> Thus, current federal law allows my wife, a U.S. citizen but non-resident of Maryland, to be favored under state law over the Adams County farmworker kids, simply because of her federal citizenship and in spite of her Maryland non-residency. In contrast, Pennsylvania may not benefit the Adams County children—longtime past, present, and likely, future, residents of the Commonwealth, simply because they are not members of the national community—despite their long-standing contributions to the state.<sup>27</sup>

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<sup>26</sup> See E-mail from Suzanne Benchhoff to Victor Romero, *supra* note 4.

Regarding the employment of children . . . most if not all employers in this county are well aware of legalities regarding children in the workforce, especially in farm labor. In other words, I am not aware of employers intentionally employing migrant children on the farms. They may accompany their parent(s) on occasion to the field, but this is frowned upon by the employers and the parents. The farming environment can be quite dangerous as well, as documented by the Amish farm accidents each year. What can be said is that young Mexican adults can provide false documents indicating their age is over 18 years when in fact they are younger. Their primary intent is to obtain employment here in the country.

*Id.*

In other parts of the country, underage farm labor is much more common, as attested to by the Symposium keynote speaker, attorney-activist Mary Lee Hall, as she described the conditions of farm laborers in North Carolina. See Mary Lee Hall, Keynote Address at the UNC School of Law, Symposium: Work, Identity, and Migration (Jan. 26, 2002).

<sup>27</sup> Indeed, in Pennsylvania, the decision as to how to afford in-state tuition has apparently been left to the individual public colleges and universities and is not regulated by state law. See Memorandum from Sharon Price, Pa. State Rep. Maitland's Office, to Bob Reilly, U.S. Rep. Tom Platt's Office (Dec. 20, 2001) (on file with author) ("As for higher education, there are, to the best of my knowledge, no State statutes that govern residency for all institutions. Each institution or the state system may establish its own policy on residency for purposes of in-state tuition rates."). Benchhoff reports that some state colleges and universities are "considering" offering scholarships to migrant students and that many programs that offer services do limit them to those who can establish

In response, one might argue that undocumented immigrants should not be favored over U.S. citizens because the latter pay taxes and the former do not. Hence, only the latter should be able to benefit from a subsidized public education. The underlying assumption is that undocumented immigrants create a net economic loss to the United States and its states by drawing more upon public funds than they contribute to society. The best evidence on this point is equivocal.<sup>28</sup> Moreover, within the realm of higher education itself, it appears that a negligible percentage of undocumented immigrants avail themselves of these particular benefits—for example, by the state's own estimates, far less than one percent of undocumented persons in California are enrolled in its public community colleges.<sup>29</sup> This is a particularly telling statistic because California is one of the largest havens for undocumented immigration,<sup>30</sup> moderating the view that more undocumented persons lead to greater strains on the public fisc.

If favoring certain out-of-state U.S. citizens or residents over undocumented immigrants defies traditional residency measures of intention and duration, then what else can be used to justify IIRAIRA's prohibition on unilateral in-state benefits to undocumented persons? A second justification underlies the

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residency. See E-mail from Suzanne Benchoff to Victor Romero, *supra* note 4.

<sup>28</sup> Compare Howard Chang, *Migration as International Trade: The Economic Gains from the Liberalized Movement of Labor*, 3 UCLA J. INT'L L. & FOREIGN AFF. 371 (1998) (finding immigration to be a net gain under several different economic models) with Jeffrey S. Passel & Rebecca L. Clark, How Much Do Immigrants Really Cost? A Reappraisal of Huddle's "The Cost of Immigrants" (Feb. 1994) (finding a net loss of \$2 billion) (cited in STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1112 (3d ed. 2002)).

<sup>29</sup> Olivas, *supra* note 24, at 1055 ("Even the open door [California] community college system estimated that fewer than one percent of their 1.5 million students were undocumented."). At the Symposium, Howard Chang reminded us that the National Research Council's figures estimate that undocumented children confer a net benefit upon the country even accounting for the costs of educating them. This is especially true across generations as their native-born children are citizens who contribute to support existing federal entitlement programs such as social security. Howard Chang, Panel Discussion, "Work & Migration," UNC School of Law (Jan. 26, 2002).

<sup>30</sup> The most recent statistics from the INS are unfortunately from 1996. As of that year, the top state of residence for undocumented persons was California. 1999 STATISTICAL YEARBOOK OF IMMIGRATION AND NATURALIZATION SERVICE, § VII, tbl. I (1999) (listing Texas, New York, Florida, and Illinois as four other top states of residence).

essence of IIRAIRA: Discouraging states from granting unilateral benefits to undocumented immigrants provides a disincentive to enter without inspection. Even assuming that this is true as an empirical matter,<sup>31</sup> this deterrent would not apply to the majority of the Adams County farmworker teens. Many of these college-age children entered the United States at a young age, often not understanding what they were doing when their parents brought them into the United States.<sup>32</sup> Their blameworthiness at the time of their entry is therefore speculative as they were unsuspecting accomplices to U.S. immigration violations. More importantly, this measure would do nothing to specifically deter them from continuing in their undocumented status. These individuals probably view themselves as American rather than foreign,<sup>33</sup> thereby making it unlikely that their ineligibility for postsecondary school assistance would compel them to either voluntarily depart the United States or submit themselves to INS removal proceedings.<sup>34</sup> Finally, it is unclear that the law has served as a general deterrent to those seeking to enter the country without documentation. Again, a brief anecdote on this point. One of my Immigration Law students last semester served on the Border

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<sup>31</sup> I, for one, am not persuaded that it does deter. It is unlikely that many, if any, undocumented persons closely scrutinize the immigration code before deciding whether to cross the border. It is more likely that they were aware of their undocumented status, but chose to enter the country anyway.

<sup>32</sup> This was a concern of Justice Brennan in *Plyler v. Doe*, 457 U.S. 202 (1982). See discussion *infra* Part III(A).

<sup>33</sup> See, e.g., Olivas, *supra* note 24, at 1019 (story of Manuel H.).

I never even knew I was Mexican . . . . I thought I was born in Magnolia or the East End, since that's all I really remember . . . . My mother took me down to the "Migra" [INS], and we waited in line for with a green bag full of papers, you know, with a twister tie on it . . . . That was when I found out that I was really Mexican, not Chicano. Born in Mexico. Except to talk to my grandfather and that, I don't even speak Spanish that well.

*Id.*

<sup>34</sup> Many persons without proper immigration documents choose to voluntarily depart rather than face deportation proceedings, primarily because of the more lenient sanctions that follow voluntary departure versus removal. E.g., compare INA § 212(a)(9)(A)(ii)(II) (barring reentry of those previously removed for 10 years) with § 212(a)(9)(B)(i)(I) (barring reentry of certain voluntary departees for 3 years). But see Curtis Pierce & John Eric Marot, *Voluntary Departure or Removal: Is There Any Difference?*, 78 INTERPRETER RELEASES 1889 (Dec. 17, 2001) (arguing that post-IIRAIRA, there might not be any incentive to leave voluntarily).

Patrol in Arizona for three years before entering law school. He shared with the class that he saw many pregnant Mexican women try to enter the country without documentation so they could give birth to their children stateside, thereby conferring U.S. citizenship upon them.<sup>35</sup> One would be hard pressed to conclude that these individuals would have ceased attempting the dangerous trek across the border had they been aware of IIRAIRA's limits on postsecondary education benefits.

In sum, IIRAIRA section 505 does not appear to be based on sound policy. While the law aims to protect out-of-state U.S. citizens, the states themselves often provide exceptions to the usual intention and duration requirements of residency laws that inure to the benefit of such citizens, while leaving the most deserving longtime residents, undocumented workers, without relief. Further, it likely does not serve as an effective deterrent to undocumented entry either generally or specifically. Hence, the law perpetuates the hierarchical status quo: Non-resident U.S. citizens are sometimes allowed in-state status, while undocumented persons, who would qualify for residency under the traditional measures of intent and duration but for their immigration status, are not.

*B. State Initiatives to Grant Undocumented Immigrants  
Postsecondary Tuition Benefits Despite IIRAIRA  
Section 505*

As of this writing, only Texas and California have enacted legislation providing in-state tuition to long-term college-bound undocumented residents in an effort to comply with IIRAIRA section 505.<sup>36</sup> Both have circumvented IIRAIRA's restrictions by

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<sup>35</sup> Geoffrey Worthington, Comments in Immigration Law Class, Pennsylvania State University-Dickinson School of Law (Fall 2001).

<sup>36</sup> The Wisconsin legislature attempted to pass a similar law, but it was vetoed by the governor based on his belief that the law was preempted by IIRAIRA section 505. News from the University of Wisconsin-Madison, *Veto Message Excerpts* (Aug. 30, 2001), at <http://www.news.wisc.edu/view.html?get=6435> [hereinafter *Veto Message Excerpts*]. An earlier California bill met the same fate: it was passed by the legislature but vetoed by the governor. Joseph Trevino, *Degrees of Inequality*, LA WEEKLY, Aug. 24-30, 2001, at <http://www.laweekly.com/ink/01/40/news-trevino.shtml> (noting that Governor Davis had "vetoed a similar bill last year").

expanding their residency requirements to afford in-state tuition to both U.S. citizens and noncitizens. Although some of their specifics vary, the California and Texas laws allow for in-state tuition at certain public colleges and universities if a person can prove the following: attendance at a private or public high school within the state for at least three years and graduation from high school or the equivalent thereof.<sup>37</sup> In addition, both laws require undocumented students to provide affidavits that they will seek to pursue lawful immigration status as soon as they are able.<sup>38</sup> Finally, both laws deny tuition benefits to nonimmigrant foreign students, those who come to the United States temporarily to pursue their college education.<sup>39</sup> These modest gains have not come easily. In California, for example, it took more than two years for the legislation to finally gain approval, with Governor Gray Davis having vetoed the first bill which he believed violated IIRAIRA section 505.<sup>40</sup> Indeed, Wisconsin's bid to become the third state to provide such benefits was thwarted when Governor Scott McCollum vetoed a similar bill on IIRAIRA noncompliance grounds.<sup>41</sup>

Thus, there is both good news and bad news for immigrants'

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<sup>37</sup> Compare CAL. EDUC. CODE § 68130.5 (West 1989) with TEX. EDUC. CODE § 54 (Vernon 1996).

<sup>38</sup> CAL. EDUC. CODE § 68139.5 (West 1989); TEX. EDUC. CODE § 54 (Vernon 1996). See also INA § 101(a)(15)(F), (J), (M), 8 U.S.C. § 1101(a)(15)(F), (J), (M) (2000) (defining "immigrant" in relation to students). The foreign student exemption might be a response to the criticism that some Asian families have sent their children to private schools in the United States on student visas, only to have them transfer to public schools upon their arrival, thus earning the pejorative moniker "parachute kids." Action Alert, Federation for American Immigration Reform, Wisconsin Governor Scott McCollum Veto's [sic] Illegal Alien Tuition Provision (Sept. 17, 2001), at <http://www.fairus.org/html/07382109.htm> (offering such criticism) (on file with the North Carolina Journal of International Law and Commercial Regulation).

<sup>39</sup> CAL. EDUC. CODE § 68139.5 (West 1989); TEX. EDUC. CODE § 54 (Vernon 1996).

<sup>40</sup> See Trevino, *supra* note 36.

<sup>41</sup> Veto Message Excerpts *supra* note 36.

I am vetoing this provision because under the federal Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [IIRAIRA], aliens who are not lawfully present in the United States are not eligible for any postsecondary education benefit based on residency in a specific state unless all legal residents of the United States are eligible for the same benefit.

*Id.*

rights advocates when looking at current state law. The good news is that, despite IIRAIRA section 505, two states have chosen to provide undocumented immigrants in-state tuition benefits by revising their residency requirements. This is particularly encouraging because in one of the states, California, the bill was signed into law after the terrorist attacks of September 11, 2001, thus undermining conventional wisdom that no pro-immigrant legislation was likely to follow such a catastrophe.<sup>42</sup> Indeed, similar laws are under consideration in Minnesota, North Carolina, Utah, and Washington.<sup>43</sup>

The bad news is that only two states have decided to pass such legislation five years after IIRAIRA section 505 took effect, and it is doubtful that many more will try in this isolationist, post-September 11 political climate. More importantly, IIRAIRA section 505 looms like a specter over this entire issue, making any promise of widespread, national relief through federal legislation illusory. Indeed, the City University of New York (CUNY) recently abandoned its long-term policy of offering in-state tuition to undocumented residents, citing IIRAIRA section 505 for its decision.<sup>44</sup>

Even if the gains in Texas and California bear fruit elsewhere, these state initiatives are necessarily limited in scope in two important ways. First, despite their eligibility for state support, undocumented students in Texas and California still do not qualify for federal financial aid. Second, without a guarantee that an undocumented person can achieve lawful immigration status following graduation from college, such a person will always live under the double threat of being ineligible to lawfully hold a job<sup>45</sup>

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<sup>42</sup> While the federal law excusing from removal those undocumented persons who had information about the terrorist attacks might be viewed as "pro-immigrant," it appears to be of a different magnitude, driven in part by the necessity to gather as much information as possible about September 11. INA § 101(a)(15)(S), 8 U.S.C. § 1101(a)(15)(S) (2000) (discussing the so-called "S" visa for those with information on terrorist activity).

<sup>43</sup> Hebel, *supra* note 9, at A22. Apparently, Georgia has been contemplating passing similar tuition benefits legislation as well. Telephone Interview with Pedro Cortes, Executive Director, Pennsylvania Commission on Latino Affairs (Jan. 18, 2002).

<sup>44</sup> Isis Artze, *Higher Education and Undocumented Students*, HISPANIC OUTLOOK, Jan. 28, 2002, at 23 (noting that City University of New York repealed its twelve year policy for granting in-state tuition to those who could prove one year of residency).

<sup>45</sup> The 1990 Amendments to the INA imposed sanctions upon employers for hiring



and possible removal from the United States.<sup>46</sup> And, since immigration regulation is a federal power, state legislatures could not tie academic achievement or state residency to immigration status. The power to change one's immigration status rests solely on Congress's shoulders.<sup>47</sup>

### III. The Solution: The Proposed Student Adjustment Act of 2001

To the extent that the ideal solution to this problem is a federal one, I advocate passage of the proposed Student Adjustment Act of 2001, which was introduced early last year (but probably met with little enthusiasm especially post-September 11 and, to my knowledge, has not been referred out of committee).<sup>48</sup> I believe

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undocumented persons. 8 U.S.C. § 1324a, b (2000). Recently, the U.S. Supreme Court ruled that an undocumented immigrant who fraudulently obtained employment was not eligible for back pay even though his employer had fired him in violation of the National Labor Relations Act. *Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S. Ct. 1275 (2002). In the name of deterring immigration violations, *Hoffman* erodes protections for undocumented immigrants by denying them wages for work already performed despite federal labor law dictates that suggest otherwise.

<sup>46</sup> INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A) (2000) (authorizing removal of persons who have entered without inspection).

<sup>47</sup> Michael Olivas will continue to press state reforms because he believes that if undocumented immigrant-rich states like California, New York, and Texas provide postsecondary education benefits, a great majority of undocumented students in the country will be covered, notwithstanding what the federal government does. Telephone Interview with Olivas, *supra* note 7.

<sup>48</sup> Introduced on May 21, 2001, the proposed act was referred immediately to the House Committee on the Judiciary and the House Committee on Education and the Workforce. 2001 Bill Tracking H.R. 1918; 107 Bill Tracking H.R. 1918 (LEXIS, Congressional Bills and Bill Tracking Library). As the immigration loose-leaf reporter, *Interpreter Releases*, has observed:

The "Children's Adjustment, Relief, and Education (CARE) Act" (S. 1265) is one of the most recent efforts in a growing movement to assist undocumented alien children who are often unable to continue their education at the university level because of their ineligibility for financial aid and in-state tuition rates. The bill, which was introduced on July 27 by Sen. Durbin and six additional cosponsors, would repeal § 505 of the IIRIRA, which provides that no state may provide a postsecondary education benefit (including in-state tuition) to an alien not lawfully present in the U.S. on the basis of the alien's residence in the state unless the state would also provide the same benefit to a citizen or national residing in another state.

The measure would also amend INA § 240A(b) to require the Attorney General to cancel the removal of and adjust to lawful permanent resident status certain

that a federal law such as the Student Adjustment Act would be a practical and fair solution to the problem of access to higher education, as it is wholly consistent with much of current immigration policy. The rest of this discussion unfolds in three parts. First, I examine and critique the proposed Act. Second, I place the Act in a larger conceptual framework of immigration law and policy. And third, I argue why, even in this post-September 11 era, such a proposal should be politically palatable to most.

### *A. The Student Adjustment Act of 2001: A Critique*

First proposed in the House of Representatives in May 2001, the Student Adjustment Act (SAA) addresses the two primary concerns identified in the opening narrative as bars to undocumented immigrants' enrollment in public colleges and universities—undocumented status and poverty<sup>49</sup>—in three specific ways. First, the SAA repeals IIRAIRA section 505, thereby returning to the states the unfettered power to determine residency requirements for in-state tuition benefits at public schools. Second, it permits undocumented students to adjust their immigration status to lawful permanent residence, provided they comply with certain age, character, educational, and residency

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alien children who: (a) are under 21 years of age; (b) have been physically present for a minimum of five years prior to the date of application; (c) have been persons of good moral character during the five-year period preceding the application for admission; and (d) are students either enrolled in a secondary school, or enrolled in or actively pursuing admission to a U.S. institution of higher education.

Sen. Orrin Hatch (R-Utah) introduced similar legislation on August 1. The "Development, Relief, and Education for Alien Minors (DREAM) Act" (S. 1291) would also repeal § 505 of the IIRAIRA and provide for cancellation of removal and adjustment of status for certain eligible alien minors. The DREAM Act, however, would make the resulting permanent resident status conditional, subject to satisfactory evidence of graduation from an institution of higher education and the filing of a petition with the INS. In addition, the Hatch bill would also require eligible aliens to apply for relief under the bill within two years of the legislation's enactment date.

Comparable legislation has been introduced in the House by Reps. Chris Cannon (R-Utah) (H.R. 1918), Luis Gutierrez (D-Ill.) (H.R. 1582), and Sheila Jackson Lee (D-Texas) (H.R. 1563).

*Flurry of Legislative Activity Precedes August Recess*, 78 INTERPRETER RELEASES 1346-47 (Aug. 20, 2001).

<sup>49</sup> See *supra* notes 6-8 and accompanying text.

requirements. And third, it allows adjusting immigrants the opportunity to apply for federal financial aid.<sup>50</sup> In sum, the SAA allows undocumented immigrants the same opportunities for postsecondary education and post-college work as the law currently provides lawful permanent residents.

At a press conference in June 2001, original co-sponsor Congressman Chris Cannon (R-Utah) argued that the bill not only benefited undocumented immigrant students, but also society as a whole. Cannon noted that “[e]ach year, ten thousand undocumented students who have lived in the U.S. for at least five years graduate from U.S. high schools.”<sup>51</sup> Most had no choice in the decision to immigrate without inspection, that choice having been made for them by their parents,<sup>52</sup> and yet, they are consigned, like Medina’s Pennsylvania farmworker children, to limited futures because of their immigration status and concomitant poverty. The SAA corrects this injustice wrought upon those whose “illegal” presence was involuntary.

More importantly, the SAA works to benefit society by providing a substantial number of children the opportunity to reach their full potential through postsecondary education. Cannon stated that among the undocumented high school graduates are “valedictorians, straight-A students, creative talents, and idealistic youngsters committed to bettering their communities.”<sup>53</sup> Society loses out on these students’ contributions by not allowing them the opportunity to flourish. The SAA helps ensure this possibility.

The U.S. Supreme Court’s decision in *Plyler v. Doe*<sup>54</sup> supports some of Cannon’s rhetoric, specifically, the unfairness visited

<sup>50</sup> Student Adjustment Act of 2001, H.R. 1918, 107th Congress § 13.1 (May 2001).

<sup>51</sup> The Office of Congressman Chris Cannon, Press Release, Cannon Introduces the Student Adjustment Act, Designed to Help Children of Illegal Immigrants Gain Access to Higher-Ed (June 7, 2001), at <http://www.house.gov/cannon/press2001/jun07.htm> (on file with the North Carolina Journal of International Law and Commercial Regulation).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* One young man, Carlos, a high school valedictorian with a 3.9 GPA, chose CUNY’s Brooklyn College specifically because it offered in-state tuition to undocumented persons. However, given CUNY’s recent policy change, overachievers such as Carlos will have even fewer postsecondary educational options. See Artze, *supra* note 44, at 23.

<sup>54</sup> 457 U.S. 202 (1982).

upon the undocumented children as well as the importance of education in helping persons reach their full potential. In *Plyler*, the Court struck down a Texas law that denied free public primary and secondary education to undocumented immigrant children.<sup>55</sup> Like Cannon, Justice Brennan took great pains to differentiate the children's culpability from that of their parents:

The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their "parents have the ability to conform their conduct to societal norms," and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases "can affect neither their parents' conduct nor their own status."<sup>56</sup>

Just as Justice Brennan chided Texas for visiting hardships upon minor children who were not responsible for their undocumented status, Cannon similarly questioned the wisdom of depriving undocumented students of the effective ability to attend college.

Aside from addressing this issue of fairness to innocent undocumented students, Brennan, like Cannon, also stressed the importance of education in helping children realize their full potential as productive members of society. Citing the Fourteenth Amendment's Equal Protection Clause, Justice Brennan extolled the leveling power of education as a means of bridging gaps between haves and have-nots:

[D]enial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.

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<sup>55</sup> *Id.* at 219-20.

<sup>56</sup> *Id.* (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)) (emphasis in original).

Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, "education prepares individuals to be self-reliant and self-sufficient participants in society."<sup>57</sup>

Some might argue that this nod to *Plyler* is inappropriate because the Court did not intend to grant broad rights to undocumented children; it merely aimed to prevent states from denying a free, basic education to its residents. In contrast, the SAA provides so much more by making all longtime, college-bound, undocumented immigrants eligible both for federal funding and immigration adjustment, and includes the possibility of additional state subsidy. The argument concludes that *Plyler* was intended to establish a constitutional floor, not a ceiling.

However, this reference to *Plyler* was not to suggest that its promises mirrored those of the SAA, only that both appear to espouse principles of fairness and equality. Both *Plyler* and the SAA pursue the common goals of enhancing fairness to blameless undocumented students and equality among persons. Put differently, providing education to undocumented immigrants furthers equality norms without compromising notions of fairness, given the non-culpability of most college-bound, undocumented persons for their immigration status.<sup>58</sup>

The many objections to proposals such as the SAA boil down to two principal types: a moral objection and an economic argument. The moral objection stems from the belief that any law allowing undocumented immigrants the opportunity to adjust status will encourage illegal immigration. The lobbying group Federation for American Immigration Reform (FAIR) frames the argument this way:

[S]ome proponents of allowing [tuition benefits] couple their advocacy with the proposal that the illegal aliens be given legal resident status. This is a form of amnesty and is objectionable for all of the reasons that any amnesty for illegal aliens is objectionable—most importantly, that it encourages others to

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<sup>57</sup> *Id.* at 222–23 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

<sup>58</sup> In addition, twenty years have passed since *Plyler* and in a world in which many opportunities for economic and personal advancement require postsecondary education, the opportunity to attend college might very well be the new educational floor.

follow in their footsteps and sneak into the country.<sup>59</sup>

The idea here is that the law prohibiting undocumented immigration is not a serious one because a people can easily adjust their status over time. FAIR cites the example of so-called "parachute kids"<sup>60</sup> taking advantage of *Plyler's* guarantee of free public education for all schoolchildren regardless of immigration status.

There are at least two responses to this argument. First, as an empirical matter, most undocumented children who will likely avail themselves of this law are students who arrived here as youths along with their parents, as Cannon,<sup>61</sup> Justice Brennan,<sup>62</sup> and indeed, Medina,<sup>63</sup> have observed. Thus, it is difficult to make the moral claim that the sins of the parents should be visited upon the innocent children, who had no control over their immigration status. Arguably, even the "parachute kids" may not be morally culpable parties if they acted solely at the behest of their parents. Second, children who knew that they were engaged in an "illegal entry," still might be ineligible for adjustment under the SAA for want of "good moral character."<sup>64</sup>

The economic argument relates to the moral one. If the SAA passes, it will create an added incentive to enter without inspection, the incentives of higher education benefits and the prospect of employment aside. As an empirical matter, there has not been much evidence that most undocumented immigration is due to a desire to pursue free or subsidized public education.<sup>65</sup> However, assuming for a moment that this is true, the age and residency requirements (as well as the "good moral character" provisions) will preclude many would-be undocumented immigrants from realizing the benefits of the SAA.

But perhaps the most interesting assumption that underlies the

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<sup>59</sup> Action Alert, *supra* note 38.

<sup>60</sup> *Id.* The term "parachute kids" refers to children from Asia who come to the United States on nonimmigrant student visas and then enter the public school system once here. See discussion *supra* note 38.

<sup>61</sup> Office of Congressman Cannon, *supra* note 51.

<sup>62</sup> *Plyler*, 457 U.S. at 222–23.

<sup>63</sup> E-mail from Carmen Medina to Victor Romero, *supra* note 4.

<sup>64</sup> 107 H.R. 1918, 107th Cong. § 3(a)(1)(E) (May 2001).

<sup>65</sup> See *supra* text accompanying notes 28–30.

opposition to schemes such as the SAA is the treatment of work as separate from education, and that while one might be a fair means for achieving membership, the other might not. In Part B, I challenge that notion, suggesting that the pursuit of higher education should be considered “work,” thereby supporting the idea of amnesty within the SAA.

*B. “Education as Work”: A Theoretical Justification for the Student Adjustment Act*

The FAIR website proffers the following argument against tuition benefit proposals:

The apologists for illegal aliens claim that their benefit to the U.S. economy is that they will do work that Americans will not do. However, their argument for [tuition benefits] is that these illegal aliens should not be forced by lack of education to do unskilled work. Thus, the advocates are arguing out of both sides of their mouths.<sup>66</sup>

FAIR’s contention has some surface appeal. If immigrants’ rights proponents insist that undocumented immigration should be tolerated because it fills a need for unskilled labor, then providing such immigrants education benefits will deplete the labor source.

However, FAIR conflates two groups of undocumented persons in its statement: those who have chosen to enter the country to work and those who did not choose to immigrate. As mentioned earlier, the typical migration pattern involves the movement of a family in which the parents make the calculated choice to enter the United States with the underlying goals of working and eventually providing their children a better life. The children, as noted by Justice Brennan and Rep. Cannon, have no say in their immigration and may provide labor as part of their perceived family duties.

Critics might respond that regardless of their intent, many undocumented immigrant children and young adults provide unskilled labor that will be diminished if tuition benefits facilitate their college attendance. But as an empirical matter, the percentage of eligible college-bound undocumented workers is quite small, thereby not depleting the labor pool as greatly as some might suspect. Medina attests that at most, two to three Mexican

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<sup>66</sup> Action Alert, *supra* note 38.

undocumented students a year from her anti-delinquency program would be able to attend college should financial aid be forthcoming.<sup>67</sup> In California, the number of undocumented students in public community colleges totals "far less than one percent . . . ."<sup>68</sup> Furthermore, even with such depletion, there will likely be more adults who will replace the few college-bound children of the prior migration wave through both lawful and undocumented entry into the United States.<sup>69</sup>

More importantly, underlying FAIR's argument is the assumption that education is not work. By asserting that tuition benefits deplete the unskilled labor pool by providing undocumented immigrants postsecondary education, FAIR implies that pursuing further education does not qualify as work. This is perhaps more clearly stated in the following argument: "The fact is that illegal aliens may not hold a job in the United States. Therefore, tax dollars expended on the higher education of these illegal aliens in order to prepare them for professional jobs is wasted."<sup>70</sup> The image here is that state and federal taxpayers would be subsidizing undocumented immigrant education instead of undocumented immigrants earning their keep through low-end labor. Yet, pursuing one's education, especially one's postsecondary education, is work.<sup>71</sup> In contrast to most jobs, the monetary benefit of this work is deferred rather than immediately

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<sup>67</sup> Interview with Carmen Medina, Executive Director of the Adams County Delinquency Prevention Program (Oct. 1, 2001).

<sup>68</sup> Olivas, *supra* note 24, at 1085.

<sup>69</sup> To address the issue of continued undocumented immigration, I agree with Jim Johnson's prescription for homeland security. In general, Johnson's proposition states that the United States should focus its efforts less on border protection and more on improving the economic welfare of other states. James H. Johnson, Jr., U.S. Immigration Reform, Homeland Security, and Global Economic Effectiveness in the Aftermath of the September 11, 2001 Terrorist Attacks 2 (draft presented at the Jan. 26, 2002 Symposium) ("[T]he U.S. has a unique opportunity to facilitate the development of a more sustainable model of globalization, one that minimizes the threat of terrorism by creating a more inclusive capitalism for the world's four billion acutely poor people.") (on file with author). By increasing the economic wherewithal of the world's poorer nations, the United States helps lessen the demand to unlawfully immigrate, which, in turn, helps secure the national border.

<sup>70</sup> Action Alert, *supra* note 38.

<sup>71</sup> *Id.*



realized.<sup>72</sup>

To FAIR's credit, it acknowledges that higher education serves as preparation for professional jobs, and in that sense, recognizes that one must work (through studying) to become a professional. Few would quibble with the notion that pursuing one's doctorate or law or medical degree is work. Indeed, many law and medical students have the opportunity to practice their profession prior to graduation in live clinic settings. Surely, such "practical skills" education is work.<sup>73</sup> However, FAIR's conclusion—that subsidizing such education is a waste because undocumented persons cannot engage in post-college work—fails to appreciate the potential of translating the "education as work" metaphor into

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<sup>72</sup> PRWORA, *codified at* 42 U.S.C. § 601, or former President Clinton's so-called "welfare-to-work" initiative, provides that some forms of education can be considered work. Therefore, one might still receive welfare benefits while pursuing an education. However, it appears that postsecondary education does not meet this expansive definition of work, suggesting that Congress intended an educational floor, not a ceiling. See Matthew Diller, *Working Without a Job: The Social Messages of the New Workfare*, 9 STAN. L. & POL'Y REV. 19, 24 (1998) ("There appear to be no circumstances in which post-secondary education may be considered a work activity.").

Apparently, these limitations on the idea of "education as work" stemmed from the perception of some legislators that education was *not* work. As Sen. (R-Texas) Phil Gramm opined:

Work does not mean sitting in a classroom. Work means work. Any farm kid who rises before dawn for the daily chores can tell you that. Ask any of my brothers and sisters what 'work' meant on our family's dairy farm. It didn't mean sitting on a stool in the barn, reading a book about how to milk a cow. 'Work' meant milking cows.

*Id.* at 25. Put differently, education was viewed as another benefit, which is consistent with FAIR's position above. Action Alert, *supra* note 38 ("Instead, the PRWORA's supporters viewed education and training as additional benefits, rather than as demands placed on recipients."). Nonetheless, PRWORA and the SAA have different ends in mind, justifying different views of what kind of education qualifies as work. PRWORA's basic aim is to find welfare recipients any job; hence, there is no emphasis on ensuring that they be able to find white-collar work. In contrast, the SAA presumes the value of postsecondary education as a necessary prerequisite to certain skilled professions. Thus, from the SAA's perspective, postsecondary education is preparatory skills training for skilled work, and hence, a necessary form of work. In contrast, PRWORA views education as an excuse not to work.

<sup>73</sup> The recent successful efforts of graduate students to unionize based on their "work" suggests a further blurring of the education/work dichotomy. See *New York University and International Union*, 332 N.L.R.B. No. 111, 2000 NLRB LEXIS 748 (Oct. 31, 2000) (upholding the finding that most of the university's student graduate assistants were statutory employees).

a viable conduit to legalization.

By and large, immigrants to this country are lawfully permitted entry in any of the following four ways: family sponsorship, an employment relationship, success in the diversity lottery, or refugee status.<sup>74</sup> Thus, one of the four primary modes of entry is by virtue of one's work—the theory being that one might be a valuable economic contributor to American society, especially when the U.S. market is in need of particular work that the domestic labor supply cannot provide.<sup>75</sup>

But an arguably untapped source of potential future labor would be those undocumented postsecondary school students who are precluded from pursuing a college education because of their immigration status or limited finances. If Congress would formally acknowledge that education is work, and that superior high school performance leading to college admission is a sign of employment potential, it would avail the country of a future labor source already educated within and familiar with the U.S. school system. Just as an employment-based immigrant visa may be viewed as a fair exchange for the anticipated contributions of the immigrating employee, the SAA's adjustment of status provision implicitly acknowledges the work undocumented high school students have done to gain acceptance into a U.S. college or university.

Furthermore, there is support for this "education as work" metaphor in other areas of the law. In the area of family and disability law, courts have sometimes blurred the distinctions between work and education for purposes of determining a parent's eligibility to pay child support or a claimant's eligibility for Social Security Act benefits. Hence, courts will consider the impact on future income that a parent's decision to attend graduate school might have on his ability to pay child support.<sup>76</sup> Similarly,

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<sup>74</sup> INA § 201(a), 8 U.S.C. § 1151(a) (2000) (outlining worldwide levels of immigration based on family relationships, employment, and diversity); INA § 207(a), 8 U.S.C. § 1157(a) (2000) (describing maximum number of refugee admissions per year).

<sup>75</sup> For example, Congress's decision to create temporary work visas for foreign nursing graduates to serve needy communities is enshrined in the immigration code. INA § 101(a)(15)(H)(i)(c), 8 U.S.C. § 1101(a)(15)(H)(i)(c) (2000).

<sup>76</sup> See, e.g., *Little v. Little*, 193 Ariz. 518, 975 P.2d 108 (1999) ("If the additional training is likely to increase the parent's earning potential, the decision is more likely to be found reasonable."), citing *Rubenstein v. Rubenstein*, 655 So. 2d 1050, 1052 (Ala.

in computing social security benefits awards, courts have consistently upheld agency determinations that reduce awards due to the fact that the claimant was employed or was in school.<sup>77</sup> In the eyes of the law, sometimes postsecondary education *is* work.

On principle, critics might object that, regardless of the economic benefits that might inure to the United States, no undocumented person should be able to receive amnesty regardless of her productivity or potential, that is, if you entered illegally, you should not benefit from that illegal act. However, at the time of their adjustment under a bill such as the SAA, undocumented students would have already contributed to the U.S. economy through their labor both within and sometimes outside of school. In contrast, foreign-based recipients of employment-based immigrant visas provide little, if any, direct contribution to the United States prior to their immigration.<sup>78</sup> In a sense, tuition benefits and the opportunity to adjust status are but fair compensation for the labor already expended by and benefits received from undocumented immigrants.<sup>79</sup> Viewed from this perspective, the idea of adjusting status based on the “education as work” metaphor seems more in line with current immigration policy.

Finally, allowing undocumented immigrants to attend college

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Civ. App. 1995) (upholding the trial court’s decision not to impute additional income to father who was completing a residency program).

<sup>77</sup> See, e.g., *Dailey v. Chater*, 1995 U.S. Dist. LEXIS 13192 (D. Kan. 1995) (upholding an administrative law judge’s decision to discredit claimant’s injury allegations based on findings that claimant was working thirty hours per week and was taking four hours of college classes three mornings per week); *Alexander v. Shalala*, Unempl. Ins. Rep. (CCH) ¶ 14612B (W.D. Mo. 1994) (claimant was able to do housework while pursuing her GED full time).

<sup>78</sup> Indeed, many U.S. companies choose to take the less risky route of sponsoring their foreign employees via a temporary, nonimmigrant work visa as a probationary measure to ensure that these employees meet their needs. See INA § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(B) (2000) (discussing temporary work visas for professionals).

<sup>79</sup> Of course, to the extent that the SAA is a form of amnesty and amnesty provisions have long been a part of immigration law, the SAA is not an extraordinary measure. See Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 5, 1986). Indeed, the SAA should be particularly attractive even to immigration restrictionists because it is both limited in its scope, affecting only college-eligible students, and is an “earned” amnesty, a reward for superior performance in high school for a select few.

free and clear of immigration or financial aid hurdles unshackles them from the fetters of low-end farm labor. In other words, the SAA would help solve Medina's problem of the "highly educated farmworker" by permitting undocumented high school graduates to recreate their identities, giving them the opportunity to enter professional, high-skilled work under the same terms as other U.S. residents.

*C. The Student Adjustment Act is Politically Palatable Post-September 11*

Even after accepting the notion that education is work, the greatest obstacle to the passage of a tuition benefits/adjustment of status proposal such as the SAA would be the lack of political will after September 11, 2001. Neither Congress nor the American public might be ready to support an amnesty proposal legalizing "illegal aliens" in this climate of heightened concern over homeland safety.

Post-September 11 sentiment has largely focused on two aspects of national security: ensuring that those who enter the United States are not terrorists and ridding our polity of terrorists already in our midst. The SAA does nothing to affect national policy on the first point, since it addresses only those noncitizens already in the United States. And as for internal security, the SAA specifically denies adjustment of status to those individuals who might pose a security risk.<sup>80</sup> Further, even if a person qualifies for adjustment, the bill does not automatically grant citizenship; it simply legalizes the individual's immigration status. Thus, if later in her life, the now lawfully admitted college student turns out to be a security risk, the government will have better information on that student. Keeping tabs on a documented individual is certainly much easier than monitoring those without immigration papers.

As a final note, I am encouraged by California's passage of its in-state residency amendment after September 11. Its promulgation is a testament to its government's realization that terrorism and alienage are, more often than not, mutually exclusive, and that acknowledging the value of higher education, especially for the least fortunate, knows no bounds of citizenship.

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<sup>80</sup> See 107 H.R. 1918, 107th Cong. § 3(a)(2) (May 2001).